

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor A

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02()-5 OF 2011(W) B
RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF AND MOHD GHAZALI FCJJ
11 OCTOBER 2011

Civil Procedure — Pleadings — Specific performance of contract — Claim for — Pleading of material facts — Whether reliance on implied term as to time of performance should be specifically pleaded C

Contract — Termination — Right to terminate — Property development agreement ('PDA') — Respondents granted appellant term of 15 years to develop property — Respondents issued termination notice 13 years and three months later on grounds of inability to perform — Whether notice issued premature and unlawful — Whether appellant under obligation to commence and complete development within 15 year period — Whether time was of essence of PDA — Whether appellant's failure to commence development amounted to repudiatory breach of contract D E

Contract — Termination — Termination clause — Contemporaneously executed interlocking agreements — Whether termination clause in one of agreements can be invoked without regard to performance under other agreements — Whether notice to terminate may be issued without giving party in breach any opportunity to rectify breach F G

Contract — Time — Time of essence — Whether time was intended to be of essence — Whether common law rule that contract must be performed within a reasonable time ousted where parties specify time for performance — Whether contract may be terminated for alleged delay where time not made of essence — Whether court may imply term making time for performance of essence — Contracts Act 1950 ss 47, 56(1) & (2) H

A property development agreement ('PDA') was entered into between the plaintiff ('appellant') and the defendants ('respondent') by the parties concerning 15.5 acres of land ('the property') belonging to the first defendant ('first respondent'). Under the said PDA, the plaintiff was given development rights over the property for 15 years, commencing 4 July 1994. The plaintiff I

- A had no legal or equitable ownership over the property. Due to the plaintiff's failure to commence development on the property, the defendants issued a termination notice dated 25 October 2007 to the plaintiff. The defendants claimed that the plaintiff's failure to develop the property as a material breach under the PDA and/or a repudiation of the same. The termination notice was
- B issued some 13 1/2 years into the subsistence of the PDA. The gist of the dispute between the parties was whether the plaintiff was required to continuously develop the property over the span of 15 years or whether the plaintiff was at liberty to commence development as and when it felt the time was right so long as it had commenced work within the 15 years period. Upon
- C service of the termination notice, the plaintiff took some steps towards initiating the development works but these efforts did not eventually materialise. The plaintiff commenced an action against the defendants for wrongful repudiation. The High Court dismissed the action on the grounds that as the PDA was a commercial contract, it ought to be construed in a
- D commercially sensible manner. It was held that it was reasonable to assume that the parties intended to have the whole property developed within the time period of 15 years. The majority in the Court of Appeal upheld the High Court decision. The plaintiff was given leave to appeal to the Federal Court on the following questions: (1) Where interlocking agreements are
- E contemporaneously executed, can the termination clause in one of them be invoked without regard to performance under the other agreements, where each was executed on the faith of the others being executed, and was a consideration for the same?; (2) whether by reason of the limitation under s
- F 56(2) of the Contracts Act 1950 ('the Act'), a contracting party could terminate a contract during the life of the contract for alleged delay where time is not made of the essence?; (3) whether by reason of s 47 of the Act, the common law rule that performance under a contract must be undertaken within a reasonable time is ousted where the parties have themselves specified time for
- G performance?; (4) whether a notice to terminate a contract issued by one party to a contract pursuant to a clause that entitles the other party to the contract an opportunity to rectify the breaches complained of is valid in law when no such opportunity is afforded to the other party?; (5) whether on a true construction of ss 47 and 56 of the Act, the court may imply a term making time for
- H performance of the contract of the essence where the contract does not expressly make time of the essence and the duration for the contract is expressly stipulated?; and (6) whether reliance on an implied term as to time of performance should be specifically pleaded where it is raised as a defence to a claim for specific performance?
- I **Held**, dismissing the appeal with costs:
- (1) Where several deeds are executed at the same time (contemporaneously executed), reference should be made to all the deeds to ascertain the intention of the parties. However, in the present case, the although four

agreements may have had connection to each other, they did not form a single transaction. The test is whether a particular agreement out of several agreements executed at the same time can be viewed as a separate transaction or whether it must be taken to be part of one transaction. The PDA here could be construed as a separate stand-alone agreement. Hence, there was nothing to preclude the exercise of the termination clause found in the PDA (see para 20).

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- (2) Whether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties. There is no necessity in law that a clause making time of the essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is to be of the essence does not ipso facto result in time being of the essence. It follows that the absence of such a clause does not per se mean that the parties did not intend for time to be of the essence. Although the PDA did not expressly state that time was of the essence, it was implicit in the PDA that time was of the essence. As such s 56(2) of the Act was irrelevant (see para 25).

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- (3) It was commercially sensible to deduce that the parties had intended for the development process to be completed (or at least substantially completed) by the end of the 15 year period. It is trite that there is a prima facie acceptance that in commercial contracts, time would be of the essence. This rule applies with even greater force in construction contracts. It can of course be rebutted if the parties indicate otherwise by words or conduct. Under the PDA, time was of the essence for the development to be commenced and completed within the 15 year period. By its failure to commence any development activity, the plaintiff was in breach of the PDA. Section 56(1) of the Act applied and the defendants were entitled to terminate the PDA (see para 31).

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- (4) Even where parties to a contract do not intend time of the essence the promisor is still obliged to perform his obligation within a reasonable time. Even if time was at large, there was still a duty on the plaintiff to commence work within a reasonable time. By failing to take the necessary steps to commence development for 13 1/2 years, the plaintiff had breached the PDA which justified the issuance of the termination notice (see para 33).

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- (5) Clause 16.1 did not create any obligation or duty for the defendants to issue a notice to the plaintiff to rectify any material breach before termination notice could be issued. Notwithstanding, the termination notice did give a 30 days period before the termination took effect. As such the defendants did act in line with the PDA in the sense that they did not seek to terminate the PDA immediately but chose to state that the PDA would be terminated upon the expiration of 30 days. The termination notice was valid in law (see para 46).

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- A (6) The defendants had sufficiently pleaded that time of performance was of the essence of the PDA. As long as the innocent party has sufficiently raised matters or facts which sufficiently show that time was of the essence that would be sufficient for the purposes of pleadings. Further, the plaintiff was not in any way taken by surprise or prejudiced by the omission of the defendants to plead the exact words. There is no legal requirement to plead the exact words saying that time was of the essence of the contract (see paras 53–54).
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Obiter:

- C (1) There was a total failure of consideration where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but not in the latter instance (see para 57).
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- E (2) Termination in anticipation of an inevitable breach is recognised under our law. It may be termed as termination upon an anticipatory breach (repudiation) or termination based upon a fundamental breach of an existing obligation (fundamental breach). The innocent party has the option to rescind the contract for breach or to affirm the contract (see para 63).

[Bahasa Malaysia summary]

- F Satu perjanjian pembangunan hartanah ('PPH') dimeterai di antara plaintiff ('perayu') dan defendan-defendan ('responden') berhubung tanah 15.5 ekar ('hartanah') kepunyaan defendan pertama ('responden pertama'). Di bawah PPH tersebut, plaintiff diberikan hak pembangunan hartanah tersebut untuk 15 tahun, bermula 4 Julai 1994. Plaintiff tidak mempunyai milikan sah atau ekuiti terhadap hartanah tersebut. Kegagalan plaintiff untuk memulakan pembangunan ke atas hartanah tersebut menyebabkan defendan-defendan mengeluarkan notis pemberhentian bertarikh 25 Oktober 2007 kepada plaintiff. Defendan-defendan mendakwa bahawa kegagalan plaintiff untuk membangunkan hartanah tersebut merupakan pelanggaran material di bawah PPH dan/atau penolakan perjanjian tersebut. Notis pemberhentian tersebut dikeluarkan 13 1/2 tahun selepas kewujudan PPH. Akar umbi pertikaian di antara pihak-pihak ialah sama ada plaintiff perlu terus membangunkan hartanah tersebut bagi tempoh 15 tahun atau sama ada plaintiff bebas untuk memulakan pembangunan apabila masa tersebut dirasakan sesuai asalkan plaintiff memulakan kerja tersebut dalam jangkamasa 15 tahun. Selepas notis pemberhentian diserahkan, plaintiff mengambil beberapa langkah memulakan kerja-kerja pembangunan tetapi usaha tersebut tidak membuahkan hasil. Plaintiff memulakan tindakan terhadap defendan-defendan untuk penolakan salah. Mahkamah Tinggi menolak tindakan tersebut atas dasar PPH
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merupakan kontrak komersial yang seharusnya ditafsir dan dijalankan secara komersial. Diputuskan bahawa adalah munasabah untuk mengandaikan bahawa pihak-pihak berniat agar keseluruhan hartanah dibangunkan dalam tempoh 15 tahun. Majoriti di dalam Mahkamah Rayuan menyokong keputusan Mahkamah Tinggi. Plaintif diberi kebenaran untuk merayu ke Mahkamah Persekutuan berdasarkan persoalan-persoalan berikut: (1) Apabila perjanjian-perjanjian yang mengikat disempurnakan secara serentak, adakah klausa pembatalan dalam mana-mana perjanjian digunakan tanpa mengambilkira pelaksanaan di bawah perjanjian-perjanjian lain, yang setiap satunya disempurnakan atas dasar perjanjian sebelumnya disempurnakan terlebih dahulu dan adakah pertimbangan tersebut adalah untuk perjanjian-perjanjian tersebut?; (2) sama ada had masa di bawah s 56(2) Akta Kontrak 1950 ('Akta'), pihak yang mengikat kontrak boleh menamatkan kontrak semasa tempoh kontrak atas sebab kelewatan yang didakwa yang mana masa bukan lagi dijadikan intipati? (3) sama ada disebabkan s 47 Akta, prinsip common law menetapkan bahawa pelaksanaan di bawah kontrak seharusnya dijalankan dalam jangkamasa yang munasabah telah ditolak apabila pihak-pihak sendiri menetapkan masa untuk pelaksanaan? (4) sama ada notis untuk menamatkan kontrak yang dikeluarkan oleh salah satu pihak kepada kontrak tersebut adalah sah di sisi undang-undang meskipun terdapat klausa yang memberikan hak kepada pihak yang lagi satu kepada kontrak tersebut peluang untuk memperbaiki pelanggaran-pelanggaran yang diadukan, sedangkan peluang tersebut tidak pernah diberikan kepada pihak tersebut? (5) sama ada berdasarkan pentafsiran sebenar s 47 dan 56 Akta, mahkamah boleh mengandaikan terdapat terma menetapkan pelaksanaan kontrak sebagai intipati, yang mana kontrak tersebut tidak menyatakan secara jelas bahawa masa sebagai intipati dan tempoh kontrak adalah dinyatakan secara tersurat?; dan (6) sama ada pergantungan terhadap terma tersirat mengenai masa pelaksanaan perlu diplid secara khusus apabila ia dikemukakan sebagai pembelaan untuk tuntutan pelaksanaan spesifik?

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Diputuskan, menolak rayuan dengan kos:

- (1) Apabila beberapa surat ikatan disempurnakan pada masa yang sama (disempurnakan serentak), rujukan perlu dibuat kepada kesemua surat ikatan untuk memastikan tujuan pihak-pihak. Walau bagaimanapun, dalam kes ini, walaupun keempat-empat perjanjian mempunyai kaitan antara satu sama lain, perjanjian-perjanjian tersebut tidak membentuk satu transaksi. Ujian terpakai ialah sama ada satu perjanjian daripada beberapa perjanjian lain yang disempurnakan pada masa yang sama boleh dilihat sebagai transaksi berbeza atau sama ada perjanjian tersebut adalah sebahagian daripada satu transaksi. PPH ini boleh ditafsirkan sebagai sebuah perjanjian berasingan dan berdikari. Oleh itu, tidak terdapat apa-apa yang menghalang penggunaan klausa pembatalan dalam PPH (lihat perenggan 20).

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- A (2) Sama ada masa dijadikan sebagai intipati bergantung kepada tindakan dan perbincangan-perbincangan pihak-pihak. Tidak terdapat keperluan dari segi undang-undang bahawa klausa menyatakan masa sebagai intipati dinyatakan dalam mana-mana kontrak. Begitu juga fakta bahawa terdapat satu klausa menyatakan masa sebagai intipati bukanlah ipso facto mengakibatkan masa dianggap sebagai intipati. Ia juga tidak bermaksud ketiadaan klausa tersebut bererti pihak-pihak tidak bertujuan menjadikan masa sebagai intipati. Walaupun PPH tidak menyatakan secara jelas bahawa masa dijadikan intipati, PPH tersebut secara tersirat berniat menetapkan masa sebagai intipati. Oleh itu, s 56(2) Akta adalah tidak relevan (lihat perenggan 25).
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- D (3) Secara komersial, adalah bersesuaian untuk mengandaikan bahawa pihak-pihak berniat agar proses pembangunan disiapkan (atau sebahagiannya disiapkan) dalam tempoh 15 tahun. Adalah benar bahawa terdapat penerimaan prima facie dalam kontrak-kontrak komersial bahawa masa dijadikan intipati. Peraturan ini digunakan secara lebih tegas dalam kontrak-kontrak pembinaan. Peraturan ini boleh disangkal sekiranya pihak-pihak menyatakan sebaliknya melalui perkataan atau tindakan. Masa dijadikan intipati di bawah PPH supaya pembangunan tersebut dijalankan dan disiapkan dalam jangkamasa 15 tahun. Plaintif melanggar PPH tersebut apabila gagal memulakan sebarang aktiviti pembangunan mengakibatkan. Seksyen 56(1) Akta digunakan dan defendan-defendan berhak untuk membatalkan PPH (lihat perenggan 31).
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- G (4) Meskipun pihak-pihak kepada kontrak tidak berniat menjadikan masa sebagai intipati, penjanji masih lagi bertanggungjawab untuk melaksanakan kewajibannya dalam jangkamasa yang munasabah. Meskipun masa ditetapkan secara bebas, plaintif masih mempunyai tugas untuk memulakan kerja tersebut dalam jangkamasa yang munasabah. Kegagalan mengambil langkah-langkah sepatutnya untuk memulakan pembangunan selama 13 1/2 tahun, plaintif telah melanggar PPH dan ini menjustifikasikan pengeluaran notis pemberhentian (lihat perenggan 33).
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- I (5) Klausa 16.1 tidak mencipta sebarang kewajipan atau tugas kepada defendan-defendan untuk mengeluarkan notis kepada plaintif untuk memperbaiki sebarang pelanggaran material sebelum notis pemberhentian dikeluarkan. Namun begitu, notis pemberhentian tersebut memberikan tempoh selama 30 hari sebelum pembatalan berkuat kuasa. Oleh itu, defendan-defendan bertindak selari dengan PPH apabila mereka tidak membatalkan PPH serta-merta tetapi memilih untuk menyatakan bahawa PPH akan dibatalkan selepas tamat tempoh 30 hari tersebut. Notis pemberhentian tersebut sah di sisi undang-undang (lihat perenggan 46).

- (6) Defendan-defendan telah memplidkan secara berpatutan bahawa tempoh pelaksanaan merupakan intipati PPH. Selagi pihak tidak bersalah telah mengemukakan perkara-perkara atau fakta-fakta yang secara bersesuaian menunjukkan bahawa masa dijadikan intipati, maka itu adalah mencukupi bagi tujuan pliding-pliding. Selanjutnya, plaintif tidak dikejutkan atau diprejudiskan dengan peninggalan defendan-defendan untuk memplid perkataan-perkataan setepatnya. Tidak terdapat keperluan di sisi undang-undang untuk memplid perkataan tepat menyatakan masa dijadikan intipati kontrak (lihat perenggan 53–54).

Obiter:

- (1) Terdapat kegagalan pertimbangan apabila seseorang yang munasabah dan berpandangan komersial melihat projek tersebut sebagai projek yang mempunyai nilai yang rendah atau langsung tidak bernilai. Sekiranya seseorang yang munasabah dan berpandangan komersial melihat pelaksanaan kontrak mempunyai nilai, maka semestinya tiada kegagalan pertimbangan sepenuhnya dan dengan ini, janji tersebut telah dilaksanakan sebahagiannya. Dalam contoh terdahulu, terdapat hak untuk membatalkan kontrak tetapi sebaliknya dalam contoh terkemudian (lihat perenggan 57).
- (2) Pembatalan disebabkan pelanggaran diiktiraf oleh undang-undang kita. Ianya boleh disebut sebagai pembatalan kerana pelanggaran jangkaan (penolakan) atau pembatalan disebabkan pelanggaran serius kewajipan yang wujud (pelanggaran serius). Pihak yang tidak bersalah mempunyai pilihan untuk membatalkan kontrak kerana pelanggaran atau mengesahkan kontrak tersebut (lihat perenggan 63).]

Notes

For cases on right to terminate, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6117–6128.

For cases for specific performance, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) para 6155.

For cases on termination in general, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6099–6147.

For cases on time of the essence, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 6375–6386.

Cases referred to

- Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (distd)
Bradley v Newsom Sons & Co [1919] AC 16, HL (refd)
Bunge Corpn v Tradax SA [1981] 2 All ER 513, QBD (refd)
Chye Fook v Teh Teng Seng Realty Sdn Bhd [1989] 1 MLJ 308, HC (refd)

- A** *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2009] MLJU 640; [2009] 9 CLJ 317, HC (refd)
Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 170; [2011] 4 CLJ 16, CA (refd)
- B** *Dr Parmanand v District Board, Patna* AIR 1962 Pat 452 (refd)
Frost v Knight (1872) LR 7 Ex 111 (refd)
Himatsing & Co v Joitaram [1970] 2 MLJ 246, CA (refd)
Law Ngei Ung v Tamansuri Sdn Bhd [1989] 2 CLJ 44 (Rep); [1989] 2 CLJ 181, HC (refd)
- C** *Manks v Whitley* [1912] 1 Ch 735; [1914] AC 132, HL (refd)
Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, HL (refd)
Mohammed Ibrahim & Anor v Mohammed Abdul Razzak AIR 2007 AP 294 (refd)
- D** *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 (refd)
Paul v IRC [1936] SC 443 (refd)
Prudential Assurance Co Ltd v IRC [1993] 1 WLR 211 (refd)
Ranieri v Miles & Anor [1980] 2 All ER 145, HL (refd)
- E** *Sat Parkash L Tara Chand v Dr Bodh Raj L Bhagwan Das Khatri* AIR 1958 Pun 111 (refd)
Sticknev v Keeble [1915] AC 386, HL (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
- F** *Swarnam Ramachandran v Jayapalan* [2004] 8 SCC 689 (refd)
Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25; [2011] 1 CLJ 51, FC (refd)
- G** *Unitramp SA v Garnac Grain Co Inc, The Hermine* [1979] 1 Lloyd's LR 212 (refd)
Universal Cargo Carriers Corp v Citati [1957] 2 All ER 70, QBD (refd)
Tan Yang Loong & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289, HC (refd)
- H** **Legislation referred to**
Contracts Act 1950 ss 47, 56, 56(1), (2)
Indian Contract Act s 46
- Appeal from:** Civil Appeal No W-02-1208 of 2009 (Court of Appeal, Putrajaya)
- I** *Cyrus Das (Alex De Silva and S Shamala with him) (Bodipalar Ponnudurai De Silva) for the appellant.*
Tommy Thomas (Alan Adrian Gomez with him) (Tommy Thomas) for the defendants.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court): A

[1] On 26 January 2011, leave was granted to appeal against the decision of the Court of Appeal given on 29 October 2009. Six questions were posed for our consideration. We heard the appeal on 14 June 2011. We reserved our decision to consider the points raised by the parties. We now give our judgment. B

[2] For convenience, in this judgment the appellant is referred to as the plaintiff and the respondents collectively as the defendants. Where necessary the defendants will respectively be referred to as either the first defendant or the second defendant. C

[3] In coming to its decision, the Court of Appeal by majority upheld the judgment of the High Court given on 22 June 2009 dismissing the action of the plaintiff. D

[4] For the reasons given below, we dismiss this appeal with costs. We uphold the decision of the learned High Court judge as affirmed by the majority in the Court of Appeal that the defendants were justified in terminating the contract. E

BRIEF BACKGROUND FACTS

[5] The courts below have thoroughly dealt with the facts in this case (see [2009] 9 CLJ 317 (HC) and [2011] 6 MLJ 170; [2011] 4 CLJ 16 (CA)). Hence, we need only to highlight the relevant and pertinent facts for the purposes of this appeal. F

[6] An agreement termed as the property development agreement ('PDA') was entered into by the parties concerning 15.5 acres of land ('the development property') located in Damansara Heights. It is not in doubt that the development property belongs to the first defendant. Under the said PDA, the plaintiff was given development rights over the development property for (15) years, commencing from 4 July 1994. It is common ground that the plaintiff does not have any interest in the land, be it legal or equitable. All the plaintiff had over the property was development rights. G H

[7] Upon the execution of the PDA, the plaintiff did not make any effort to commence development on the development property. It is not in doubt that the plaintiff failed to take any proactive measure to develop the said land. In consequence, by letter dated 25 October 2007, the defendants issued a termination notice to the plaintiff, citing the latter's failure to develop the I

- A development property as a material breach under the PDA and/or a repudiation of the same. As such, it was declared that the PDA would effectively terminate on 25 November 2007. It is not in doubt that the termination notice was issued some thirteen and a half (13 1/2) years into the subsistence of the PDA.
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- C [8] The gist of the dispute between the parties is this – whether the plaintiff was required to continuously develop the development property over the span of fifteen years or whether the plaintiff was at liberty to commence development as and when it felt the time was right so long as it had commenced work within the 15 years period. It is to be noted that only upon service of the termination notice did the plaintiff take some steps towards initiating the development works. However, these efforts did not eventually materialise.
- D [9] The plaintiff commenced an action against the defendants for wrongful repudiation. The High Court dismissed the action. The learned High Court judge, having carefully scrutinised the PDA, found, inter alia, that as the PDA was a commercial contract, it ought to be construed in a commercially sensible manner which the parties all along intended for time to be of the essence. As
- E such, in his view, it was reasonable to assume that the parties intended to have the whole development property land developed within the time period of fifteen years. The learned High Court judge did not think that the PDA intended to give the plaintiff the liberty to commence development at the tail end of the fifteen year period.
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- G [10] The learned High Court judge also made a finding of fact that efforts to develop the development property were only made upon the issuance of the termination notice by the defendants and nothing of that sort was done thirteen years prior to that. Hence, the learned High Court judge took the view that the plaintiff could not insist on holding on to the remaining nineteen months of its development rights simply because the delay on the plaintiff's part was so prolonged that it justified the defendants to terminate the PDA.
- H [11] In upholding the judgment of the learned High Court judge, the majority in the Court of Appeal was of the view that the learned High Court judge was right in arriving at his conclusion. The majority agreed that the PDA being a commercial contract must be construed in a commercially sensible manner. The majority also opined that the PDA did not merely impose an
- I obligation for the plaintiff to commence development by applying and obtaining a development order but to actually undertake and complete the development on the development property within the said fifteen year period. Thus, as time was of the essence of the PDA, the plaintiff was not at liberty to commence development at its own leisure.

[12] Thus, the majority in the Court of Appeal concluded from a legal standpoint that the defendants were entitled at law to terminate the PDA and need not have waited for the expiration of the fifteen year period. The plaintiff clearly by its conduct was in breach of the PDA. The majority also rejected the plaintiff's contention that it would be entitled to a three year extension if the development order had been granted by the authorities. The majority found that there was no automatic extension under the PDA, that to adopt such an interpretation would not be commercially sensible, that such an interpretation would be contrary to the implied term that time was of the essence of the contract, and it was not possible for a project of such a magnitude to be completed within a three year period.

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[13] The minority view in the Court of Appeal held that time was not of the essence under the PDA because the plaintiff had been given 15 years to develop the development property. There was no time set for the plaintiff to perform its obligation and there was no requirement for the plaintiff to commence development within a reasonable time. In coming to such a view, the minority took the view that such a termination could only be justified under the doctrine of anticipatory breach. However, no such circumstances existed in the present case because the plaintiff had not indicated by its words or conduct that it would not be able to perform its obligation at the expiration of the said period. The minority was also of the view that the plaintiff was entitled to develop only part of the land and was not obligated to develop the whole land. Accordingly, the minority concluded that since the time period was still in existence, the defendants' termination was premature and unjustified.

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LEAVE QUESTIONS

[14] We shall now proceed to deal with the leave questions. Leave was granted for the following six questions:

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- (a) Where interlocking agreements are contemporaneously executed, can the termination clause in one of them be invoked without regard to performance under the other agreements, where each was executed on the faith of the others being executed, and was a consideration for the same?
- (b) Whether by reason of the limitation under s 56(2) of the Contracts Act 1950, a contracting party could terminate a contract during the life of the contract for alleged delay where time is not made of the essence?
- (c) Whether by reason of s 47 of the Contracts Act, the common law rule that performance under a contract must be undertaken within a reasonable time is ousted where the parties have themselves specified time for performance?

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- A (d) Whether a notice to terminate a contract issued by one party to a contract pursuant to a clause that entitles the other party to the contract an opportunity to rectify the breaches complained of is valid in law when no such opportunity is afforded to the other party?
- B (e) Whether on a true construction of ss 47 and 56 of the Contracts Act 1950, the court may imply a term making time for performance of the contract of the essence where the contract does not expressly make time of the essence and the duration for the contract is expressly stipulated?
- C (f) Whether reliance on an implied term as to time of performance should be specifically pleaded where it is raised as a defence to a claim for specific performance?

Question One — Interlocking agreements

- D [15] The crux of the plaintiff's argument is that the courts below fell into error by construing the PDA as a stand-alone agreement. Counsel for the plaintiff submitted that there were four agreements executed on the same date (7 January 1993) namely the main agreement, the new property development agreement, the property sales agreement and the PDA. It was therefore
- E contended by learned counsel that the four agreements were interlocking in nature and ought to be considered as a whole. In other words, none of the said agreements could be considered in isolation. And he pointed out that a close scrutiny of all four agreements would show the commercial intention behind
- F the bargain of the parties which was that the plaintiff had bought the right to remain on the subject land and develop the whole or any part of the land at its own pace and discretion. It was also emphasised that the plaintiff had in fact performed its obligations under the other agreements such as the payments of RM40m. Such payment should be taken into account as consideration since all
- G the four agreements were interlocked.

- [16] In response, learned counsel for the defendants raised two points. First, he argued that the remaining agreements were not part of the issues to be tried before the High Court. As such the trial proceeded without any reference to the interlocking nature of the said agreements. Second, it was contended that each
- H of the said agreements should be considered on its own merit. The clauses are distinct and even the parties are different. As such, learned counsel contended that the plaintiff's argument of the PDA being subjected and confined to the other agreements could not be in countenance with the law of contract.

- I [17] We think there is basis for raising the first point. The argument on the agreements being interlocked was not before the courts below. Thus, it is quite unfair to now say that the courts below erred in construing them as they did. Ordinarily we would have precluded the plaintiff from formulating such

argument but question one was allowed when leave was granted. In fact question one presupposes that the agreements are interlocked when there was no such finding of fact made in the courts below.

[18] In any event, we do not think it is in dispute in that the general rule is that where several deeds are executed at the same time (contemporaneously executed), reference should be made to all the deeds to ascertain the intention of the parties (see *Manks v Whitley* [1912] 1 Ch 735; [1914] AC 132 and *Mohamed Isa v Abdul Karim* [1970] 2 MLJ 165).

[19] However, in this case upon construing all the four agreements as a whole we are not persuaded by the argument advanced for the plaintiff. We are of the view that the interpretation preferred by the plaintiff does not make any commercial sense. In *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 it was said that in ‘determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person would construe them’.

[20] The four agreements may have connection to each other. However, we do not think together they form a single transaction. They may seek to achieve a certain goal, ie a common end result, but it does not mean they must necessarily be invoked together to achieve the goal. Equally the combined effect of several separate transactions arising from each of the agreements could achieve the desired end result. The test therefore, is whether a particular agreement out of several agreements executed at the same time can be viewed as a separate transaction or whether it must be taken to be part of one transaction. And although the PDA may be regarded as an ancillary agreement it does not, in our view, mean that it cannot be construed as a separate stand-alone agreement.

[21] The foregoing approach is not without precedent. In *Prudential Assurance Co Ltd v IRC* [1993] 1 WLR 211 Sir Donald Nicholls V-C was faced with three separate agreements executed on the same date. The first was an agreement to purchase a freehold property. The second was an elaborate agreement for development. The third was an agreement for transfer of the land. In addressing the issue His Lordship, *inter alia*, said this at p 217:

In the present case the sale agreement and the development agreement and, indeed, the transfer were all part of one transaction in the sense that together they comprised a single package or bargain. They were all executed on the same day and, no doubt, all three were executed simultaneously. Clearly the end result intended by the parties was that the land, previously belonging to the developers, would become the

A property of the taxpayer company together with the new buildings being constructed by the developers. The commercial object of the transaction was that the taxpayer company would acquire a development being carried out for it by the developers with funds provided by the taxpayer company.

B However, I am unable to characterise the transaction by which that end result was sought to be achieved as a sale of the land with finished buildings thereon. That, manifestly, was not the legal shape of this transaction. The sale agreement was, as the parties intended, completed independently of the carrying out of the building works under the development agreement.

C [22] It is interesting to note that in *Prudential Assurance* reference was made to the decision in *Paul v IRC* [1936] SC 443 where Lord President Normand observed thus:

D While the question is, in the sense which I have described, one of fact, there must be materials from which the inference can be drawn that the two contracts, one of feu and the other for building, in reality embody one bargain. Before that inference can legitimately be drawn, it is necessary that the facts should establish, first, that the superior and the building contractor were one and the same person, or that the one was the agent or the nominee of the other; and secondly, that the contracts are so interlocked that, if default is made on either, the other is not enforceable by either side.

F [23] Hence, in this case, to accede to the plaintiff's contention would actually alter the legal shape of the end result which the parties had intended way back in 1993. Furthermore, there is insufficient material before this court (and as in the courts below) to arrive at the inference that all the said agreements in reality embody one bargain. In fact, nothing is shown that the agreements are so interlocked that if default is made of either, the other cannot be enforceable by the other side. As such, in our view, the said four agreements, though related, are separate and not interlocked. And it follows that in view of our conclusion the payment of RM40m submitted by learned counsel for the plaintiff as being evidence of part performance of the obligations under the agreements is irrelevant to the issues for our consideration in this appeal.

H [24] It follows that there is nothing to preclude the exercise of the termination clause (cl 16) as found in the PDA.

Question Two — Effect of s 56(2) of the Contracts Act 1950

I [25] Question two implies that it is a principle of law that in order for time to be of the essence it must be stipulated in a given contract. With respect, such an impression, whether intended or otherwise, is erroneous. On the contrary, it is trite law that a contract need not contain such a term or clause for time to be made of the essence in the same way 'that a stipulation as to time must be

read along with other provisions of the contract to determine if time is truly of the essence of the contract' (see *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269). Thus, whether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties. There is no necessity in law that a clause making time of the essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is to be of the essence does not ipso facto result in time being of the essence.

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[26] In the case of *Mohammed Ibrahim & Anor v Mohammed Abdul Razzak* AIR 2007 AP 294 the High Court of India observed that 'it is settled law, merely because there is a mention in the agreement making time as essence of the contract, it does not mean that such time is made an essence of the contract. The court has to decide the same while taking in to consideration the intention of parties in making such a stipulation, their conduct and surrounding circumstances'.

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[27] It follows that the absence of such a clause does not per se mean that the parties did not intend for time to be of the essence. In *Ranieri v Miles & Anor* [1980] 2 All ER 145 Lord Edmund-Davies in his speech rejected an assertion that in the absence of a clause stating that time was of the essence, the law regards the contract as unbroken provided that defaulting party performs its obligation within a reasonable time from the due date.

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[28] We are of course conscious that in any given contract where time is not of the essence, whether express or implied, then s 56(2) is relevant. In such case the innocent party is not entitled to terminate the contract and is only entitled to damages. It is under s 56(1) where time is of the essence that the innocent party may exercise its right to terminate the contract.

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[29] The distinction between the two sub-sections of s 56 has been succinctly explained by Cheong May Fong in *Civil Remedies in Malaysia*, Sweet & Maxwell Asia, 2007, at p 38 where the learned author said the following:

In both s 56(1) and 56(2), a specified date is fixed for performance. However, under s 56(1), there is an intention that time should be of the essence of the contract but there is no similar intention under s 56(2). Thus, the effect of a breach to perform at the time stipulated under s 56(1) where time is of the essence cause the contract to be voidable and gives the innocent party the option whether to terminate (rescind) or carry on (affirm) the contract. On the other hand, a breach to perform within the time stipulated under s 56(2) where time is not of the essence, the contract is not voidable and the innocent party is only entitled to compensation for the loss suffered as a result of the breach.

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[30] Reverting to this present case, it is not in doubt that the PDA does not

A expressly state that time is of the essence. However, we note that the learned High Court judge and the majority of the Court of Appeal concluded that it was implicit in the PDA that time was of the essence. We agree with their finding. As such s 56(2) becomes irrelevant. It follows that question two need not be answered.

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[31] We also agree with the finding of the courts below that the assertion that the plaintiff was entitled to commence development at a time of its choice or at its own leisurely pace and the argument that the plaintiff had the right to a further three year extension upon the expiration of the fifteen year period to be wholly untenable. Indeed, it would be commercially sensible to deduce that the parties had intended for the development process to be completed (or at least substantially completed) by the end of the fifteen year period. Here, nothing to that effect has been done. It is far from completion. In fact, it has not even commenced. And incidentally, it is trite that there is a prima facie acceptance that in commercial contracts, time would be of the essence (see *Bunge Corpn v Tradax SA* [1981] 2 All ER 513; *Himatsing & Co v Joitaram* [1970] 2 MLJ 246). That rule, in our view, applies with even greater force in construction contracts. It can of course be rebutted if the parties indicate otherwise by words or conduct, but for a starting point, it must be assumed that the parties intended for time to be of the essence. It would not make much commercial sense if otherwise.

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[32] Accordingly, it is our considered view that under the PDA, time was of the essence for the development to be commenced and completed within the fifteen year period, even though it does not set out in detail the stages in which the development is to be progressed upon. By its failure to commence any development activity over the development property, the plaintiff is guilty of a breach of the PDA. Section 56(1) applies and the defendants were entitled to terminate the PDA.

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Question Three — Effect of s 47 of the Contracts Act 1950

[33] In view of our conclusion for question two we need not have to address this question three. However for completeness we say that it is a common law principle that even where parties to a contract do not intend time of the essence the promisor is still obliged to perform his obligation within a reasonable time. And it has been embodied in s 47 which reads:

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I 47 Time for performance of promise where no application is to be made and no time is specified

Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation - The question 'what is a reasonable time' is, in each particular case, a question of fact.

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[34] However, in this case learned counsel for the plaintiff contended that since in this case there is already a time specified in the PDA, s 47 has no application. In other words the common law of reasonable performance within a reasonable time does not apply.

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[35] In response learned counsel for the defendants submitted that even if time was not of the essence in the PDA, s 47 should apply. He went on to argued that 'the law of contracts in the common law world (unless the parties expressly agree otherwise) does not permit time to be at large, open-ended or indeterminate. Rather, the law is either that parties, expressly or impliedly, regard time as of the essence in which event s 56(1) would apply, or do not intend that time to be of the essence in which event s 47 would apply'.

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[36] Now, in general we would say that there is merit in the argument of learned counsel for the plaintiff. However, on the facts and circumstances in this case such argument is untenable.

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[37] Clause 1.1 in PDA provides:

The New Developer grants the right to the Company to develop the Development property for a term of 15 years from the date of completion of the Acquisition Agreement upon the terms herein contained.

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[38] The above clause could not reasonably be construed to allow the plaintiff to commence development only when the 15 years period is about to end. There is no other clause in the PDA or any other indication which would allow such construction or inference.

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[39] Hence, we are more inclined to agree with learned counsel for the defendants. In *Stickney v Keeble* [1915] AC 386, Lord Atkinson clearly could not accept the argument which is somewhat similar to what was submitted for the plaintiff in this case. This is what the His Lordship observed:

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I feel, myself, quite unable to assent to the two propositions following, which, as I understood, were laid down by Mr Hughes:

- (a) That no matter how distant the day may be which is fixed for completion by the parties to a contract for the sale and purchase of land - though, indeed, it be measured by years — a vendor who takes no steps to complete within that lengthened period is, in order to make time of the essence of the contract, entitled to notice giving him a reasonable time after its termination to do all he had left undone.

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- A (b) That where no time for completion is fixed in the contract and the law imports into it a provision that it is to be completed within a reasonable time, this reasonable time is not of the essence of the contract in equity, so that a defaulting vendor may do nothing to complete during its currency and be yet entitled to get a reasonable time after its termination to do all that the law intended he should do while it was running. If I misunderstood him I apologize.
- B (c) I think the authorities I have cited show that these propositions are untenable.

C [40] Similar sentiment was expressed in *Sat Parkash L Tara Chand v Dr Bodh Raj L Bhagwan Das Khatri* AIR 1958 Pun 111. The learned High Court judge in the course of discussing s 46 (in pari materia with our s 47) the Indian Contracts Act said this:

- D As a result of the above discussion, I am definitely of the opinion that time will be of the essence of the contract if it is so provided in the contract or if one of the parties after unreasonable delay on the part of the other party gives a reasonable notice to the other party making times as of the essence of the contract. If none of the two has happened, reasonable time will be deemed to be the time which will be of the essence of the contract.
- E I am not prepared to agree that the only modes in which the time can be made of the essence of the contract are by express provision in the contract or by notice by one of the parties. *In my opinion, the law engrafts on the contract a condition that reasonable time in the absence of any specific time provided in the contract will be of the essence of the contract and if the contract is not performed within that reasonable time by any of the parties, the said party will be deemed to be guilty of breach of duty or breach of contract.*
- F (Emphasis added.)

G [41] Accordingly, it is our considered view that even if time was at large, there was still a duty on the plaintiff to commence work within a reasonable time. By failing to take the necessary steps to commence development for thirteen and a half years, the plaintiff has indeed breached the PDA which justified the issuance of the termination notice.

H *Question Four — Termination notice*

I [42] Simply put, question four disputes the validity of the termination notice issued pursuant to cl 16 of PDA which entitles the plaintiff an opportunity to rectify the breaches complained of upon notice but was not afforded such opportunity in this case.

[43] Clause 16.1 provides:

Termination

In the event of a material breach of this Agreement by the Company the Landowner or the New Developer or both shall be entitled to give notice to the Company to rectify the breach within thirty (30) days of the issue of the notice and if the breach is not rectified by the end of thirty (30) days the Landowner and the New Developer shall be entitled to terminate this Agreement summarily and thereupon the Development Property shall revert back to the Landowner and the New Developer and the Landowner and the New Developer shall be entitled to take such steps and actions as shall be necessary to repossess the Development Property.

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[44] Learned counsel for the plaintiff contended that there was no notice demanding rectification of the alleged breach prior to the termination notice. For such failure, it was argued that the termination notice was thus unlawful. And it was further contended that the defendants were wrong to assume that the plaintiff was unable to rectify the breach.

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[45] In response learned counsel for the defendants submitted:

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- (a) That the PDA would have automatically expired by 3 July 2009 and required no notice to trigger it. And no right for extension;
- (b) that cl 16 is to terminate the PDA before the expiry date which only the defendants could exercise subject to there exist material breach. But issuance of such notice is neither obligatory nor a duty. It is up to the defendants whether to issue or not since the clause says 'shall be entitled to give notice to' rectify the material breach within 30 days;
- (c) that it would be impossible to rectify the total absence of development works within 30 days; and
- (d) that the 'law does not impose on the defendants an obligation to state in the notice, which was given by letter dated 25 October 2007, to expire on 25 November 2007, that the plaintiff should rectify the material breach of at least commencing development on the development property simply because that it would have been a practical impossibility'.

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[46] We are inclined to agree with the contentions of learned counsel for the defendants. Clause 16.1 does not create any obligation or duty for the defendants to issue a notice to the plaintiff to rectify any material breach before termination notice can be issued. Notwithstanding, the termination notice did give a 30 days period before the termination took effect. As such the defendants did act in line with the PDA in the sense that they did not seek to terminate the PDA immediately but chose to state that the PDA would be terminated upon the expiration of 30 days. In our view the complaint of the plaintiff is without merit. Hence, we are therefore satisfied that the termination notice is valid in law. Our answer to question four is thus in the affirmative.

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A *Question Five — Implying into the contract that time is of the essence*

[47] In respect of question five we are of the view that it has already been answered when we were addressing questions two and three above. As such we do not think it is necessary for us to answer this question five.

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Question Six—The need to plead that time is of the essence

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[48] At the outset we note that the issue raised in this question six was not dealt with in the courts below. As such, strictly speaking, it should not be an issue before us (see *Terengganu Forest Products Sdn Bhd v Cosco Container Lines Co Ltd and other applicatons* [2011] 1 MLJ 25; [2011] 1 CLJ 51). However for the same reason we gave in answering question one, we would thus proceed to consider this question. Meanwhile, it is quite ironic that before us it is the plaintiff which is questioning the defendants of their reliance on the issue of time being the essence of the contract.

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[49] Basically, it is the submission of learned counsel for the plaintiff that the defendants did not plead time as being the essence of the PDA. As such, if indeed the defendants were relying on an implied term that time was of the essence, this must necessarily be pleaded. Learned counsel cited the case of *Swarnam Ramachandran v Jayapalan* [2004] 8 SCC 689 where the Indian Supreme Court said that ‘the onus to plead and prove that time was of the essence is on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of the essence’.

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[50] In response, learned counsel for the defendants argued that whether or not time was to be of the essence depended on the nature or subject matter of the contract and is to be inferred from the intention and conduct of the parties. It was therefore contended that the defendants have indeed sufficiently pleaded all this in their amended defence and therefore the plaintiff cannot now contend that they did not have notice of the defendants’ intention to assert that time was of the essence of the PDA.

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[51] Now, we are mindful of the rationale surrounding pleadings. The true purpose behind pleadings is so that the other side is not taken by surprise and is given the opportunity to rebut an assertion or an allegation at the earliest possible moment. It also helps to narrow down the issues to be tried. The issue therefore is whether the amended defence has sufficiently laid down the defendants assertion that time was of the essence in the performance of the PDA.

[52] Having scrutinised the amended defence, we are inclined to agree with the defendants that they have sufficiently done so. For instance:

- (a) para 19 states that the PDA ‘clearly indicates that its essence is the

undertaking by Damansara Realty (the plaintiff) of development on the development property during the 15 year term. Thus, development is a fundamental term of the PDA and goes to its roots’;

- (b) para 22 states that the ‘development of the project by Damansara Realty was the ‘raison d’etre’ of the PDA and because the development was going to be complex, it would take time: hence the 15 year term’; and
- (c) para 23 states that the ‘defendants contend therefore that Damansara Realty (the plaintiff) is to procure that the development is not only begun, but also completed within the said 15 year term’.

[53] Accordingly, it is in our considered opinion that the defendants have sufficiently pleaded that time of performance is of the essence of the PDA. To accede to the plaintiff’s argument would mean that the innocent party would have to expressly plead that ‘time was of the essence of the contract’, of which the law does not require (see *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit Bin Matusin & Ors* [1994] 3 MLJ 185). We therefore hold that as long as the innocent party has sufficiently raised matters or facts which sufficiently show that time was of the essence that would be sufficient for the purposes of pleadings. We are further of the view that the plaintiff was not in any way taken by surprise or prejudiced by the omission of the defendants to plead the exact words.

[54] As such, our answer to question six is in the negative since there is no legal requirement to plead the exact words saying that time was of the essence of the contract. As long as sufficient facts or matters have been pleaded to give rise to the same, this requirement would be complied with.

OTHER ISSUES

[55] There are some other issues raised in the course of argument before us. However, we do not think we need to seriously address them since they do not form part and parcel of the questions posed for our consideration. Nevertheless, for completeness we will briefly discuss them.

[56] Learned counsel for the plaintiff submitted that the main principle of law enunciated in *Berjaya Times Square Sdn Bhd* should be applied in this case. Learned counsel for the defendants opined otherwise.

[57] Whether or not an innocent party can treat the contract as having been repudiated is a question of fact. It depends on the facts and circumstances of each case. The main consideration is whether or not there has been a total failure of consideration. This can be derived from s 40 of the Contracts Act 1950 where the words ‘his promise in its entirety’ appear.

- A [58] In *Berjaya Times Square Sdn Bhd* it was held as long as some work has been done indicating that the development or construction had commenced, there would be no total failure of consideration because the promise had been performed although not in its entirety. On the facts of that case the decision may be supportable. But we do not agree with the stand that there can be no
- B total failure of consideration so long as part of the promise has been fulfilled.
- C [59] In our view, whether or not there has been total failure of consideration is a question of fact which can be resolved by looking at the circumstances of the case. Each case has its own peculiar facts. No two cases can be said to be identical although they may be similar. We are inclined to take the view that minimal works such as getting development permission orders or taking possession over the land for development purposes may not in most instances fall on the same side as *Berjaya Times Square Sdn Bhd*. This is simply because
- D such an interpretation does not make commercial sense. What good is a mere foundation of an office building to a company? In such circumstances, it must be taken as if the promise had not been fulfilled in its entirety.
- E [60] In fact in *Berjaya Times Square Sdn Bhd*, it did not rule as wrong the conclusions in the cases which allowed termination of the respective contracts on the ground that there was failure to complete the contractual works (see *Tan Yang Loong & Anor v Newacres Sdn Bhd* [1992] 1 MLJ 289; *Chye Fook v Teh Teng Seng Realty Sdn Bhd* [1989] 1 MLJ 308; *Law Ngei Ung v Tamansuri Sdn Bhd* [1989] 2 CLJ 44 (Rep); [1989] 2 CLJ 181). As such the principle should
- F therefore be this. There is a total failure of consideration (and a failure to perform a promise in its entirety) where a reasonable and commercially sensible man would look upon the project of having little or no value at all. If the reasonable and commercially sensible man sees the performance of the contract
- G of having some value, it should be taken that there has been no total failure of consideration and accordingly the promise has been performed in part. In the earlier instance, there is a right to terminate the contract, but not in the latter instance.
- H [61] In any event, the factual matrix of *Berjaya Times Square Sdn Bhd* is not in any way similar to the present case in which it is beyond doubt that nothing has been done towards the development of the land for the past thirteen and a half years from the fifteen year period. By contrast, in that case, the project was
- I substantially completed at the due date. The remaining issue was whether the delay in completion (which was eventually completed) could give sufficient reason for the innocent party to terminate on the ground that the delay resulted in a fundamental breach going to the root of the contract. It was held that it did not warrant for termination. Another difference of that case with the present is

the complaint there was premised based on the due date, whereas in the present case, the due date was one and a half years away. This brings us to our next point for discussion.

[62] The right of an innocent party to terminate a contract or treat itself as having been discharged from the contract is mainly premised on the grounds of repudiation or fundamental breach.

(See *Civil Remedies in Malaysia* at p 10 where the learned author states that the 'grounds for discharge of a breach that amounts to (a) a repudiation and (b) a fundamental breach is used in the English text of *Cheshire, Fifoot and Furmston's Law of Contract*'). Thus, for academic purposes, those two grounds for discharge are treated as separate. Other texts have different classifications. Nevertheless, in reality, they often overlap with each other and it would serve not much purpose to distinguish them as separate heads. Be that as it may, it is generally accepted that repudiation is where a defaulting party has repudiated the contract before performance is due or before it has been fully performed, whereas a fundamental breach is where the promise which had been violated is one of major importance (see *Cheshire, Fifoot and Furmston's Law of Contract*, (15th Ed), Oxford University Press at p 681).

[63] The question at hand is what type of termination has been exercised in this case. The Court of Appeal seemed to have gone on the premise that the termination was made in an anticipated breach which was inevitable, or called an 'anticipatory breach'. With respect we do not think it is a clear-cut case. An anticipatory breach is where a fixed and exact date has been set for performance and one of the parties has indicated his refusal or displayed inability to perform his part of the bargain. Thus, in such circumstances, where it becomes apparent that a breach would be inevitable, the innocent party may be entitled to anticipate the said default and terminate the contract before it is due. This makes perfect commercial sense because the innocent party may proceed to make other necessary arrangements as may be required.

[64] However, the present case does not exactly fall under the category of an anticipatory breach albeit quite similar. In our opinion, the present case is more towards a situation where there has been a breach of a continuing promise. It is certainly a case of repudiation but also involves a fundamental breach of an existing obligation which gives rise to the inevitable conclusion that the promise or bargain would not be fulfilled by or on the due date. In this regard we need only refer to the English case of *Frost v Knight* (1872) LR 7 Ex 111 where Cockburn CJ said the following:

- A The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance: but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party
- B not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.
- C On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss.
- D [65] And Cockburn CJ asserted that ‘the promisee has an inchoate right to the performance of the bargain, which becomes complete when the time for performance has arrived’ and finally he observed as follows:
- E The contract having been thus broken by the promisor, and treated as broken by the promisee, performance at the appointed time becomes excluded, and the breach by reason of the future non-performance becomes virtually involved in the action as one of the consequences of the repudiation of the contract; and the eventual non-performance may therefore, by anticipation, be treated as a cause of action, and damages be assessed and recovered in respect of it, though the time for performance may yet be remote.
- F
- G [66] It is therefore our considered opinion that a termination in anticipation of an inevitable breach is recognised under our law. It may be termed as termination upon an anticipatory breach (repudiation), or termination based upon a fundamental breach of an existing obligation (fundamental breach). For construction contracts, the latter would be more suited because it involves construction works over a period of time. The former is more suited for delivery of goods or contract for personal services. In any event, it is just a matter of terminology of which the modern day courts are not overly
- H concerned with. In both circumstances, the innocent party is entitled to treat the contract as having been repudiated and may rightly treat itself as having been discharged from the contract. The innocent party has the option to rescind the contract (ie rescission for breach) or to affirm the contract.
- I [67] A passage from *Civil Remedies in Malaysia* may make the point clearer where the learned author states the following at p 14:

It has been explained that '[a] contract is a contract from the time it is made, and not from the time performance is due'. The promisee, while awaiting performance, is entitled to assume that the promisor will himself remain ready, willing and able to perform his side of the contract at the agreed date. *Any conduct by the promisor which destroys this assumption 'is a breach of a presently binding promise, not an anticipatory breach of an act to be done in the future'*. In *Frost v Knight*, the defendant in retracting his promise to marry the plaintiff, violated not a future but an existing obligation. (Emphasis added.)

(See also *Bradley v Newsom Sons & Co* [1919] AC 16 per Lord Wrenbury)

[68] Hence, in our view the law does not require that the said inevitable breach must be of an absolute certainty but considers it on a reasonable and practical basis (see *Universal Cargo Carriers Corp v Citati* [1957] 2 All ER 70). We would add further that whether or not the conduct of the defaulting party (or would-be in default party) would justify the termination of the contract by the innocent party would depend on the nature of such conduct. In the present case, the conduct complained of is the prolonged delay. Where such delay would frustrate the commercial adventure the innocent party is entitled to treat the contract as having been repudiated (see *Unitramp SA v Garnac Grain Co Inc, The Hermine* [1979] 1 Lloyd's LR 212). Such delay also goes to show that the defaulting party has either refused to perform or disabled himself from performing his promise in its entirety. In *Dr Parmanand v District Board, Patna* AIR 1962 Pat 452 the High Court of India observed the following:

The plaintiff was absent for over three years and nine months before the termination came under exh 4, and this period was long enough to show that the plaintiff either refused to perform or disabled himself from performing his promise in its entirety.

[69] Reverting to the present case we are of the view that the plaintiff's prolonged and unreasonable delay is one that frustrated the commercial adventure entered into by the parties. Such delay is also one that goes to show that the plaintiff had either refused to perform or disabled itself from performing its promise in its entirety. Whichever angle one looks at it, being from the viewpoint of repudiation or from a viewpoint of fundamental breach, the plaintiff remains in breach of the contract.

CONCLUSION

[70] Accordingly, for the above reasons we have given, it is our considered judgment that this appeal must be dismissed with costs.

A *Appeal dismissed with costs.*

Reported by Kanesh Sundrum

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